10600 Respondent Inability to Pay

10600.1 Overview: Respondents may claim a financial inability to pay backpay or other liabilities arising from unfair labor practice proceedings. In order to facilitate the ultimate satisfaction of backpay liabilities, either through collection or contempt, the Region must be prepared, in all such cases, to thoroughly investigate respondent's financial condition.

See Compliance Manual section 10590.8(d) for further discussion of this topic, in the context of a postjudgment case. The investigation should consider levels of activity, revenues, and expenses in order to evaluate current income or losses. Assets should be reviewed. The investigation should also be alert for large, unsubstantiated expenses, transfers of assets, or other indications that the respondent is removing assets or seeking to render itself incapable of paying liabilities.

Based on the results of the investigation and the stage of unfair labor practice proceedings, it may be appropriate to recommend one or more of the following actions:

a. Compliance proceedings to fully liquidate respondent liabilities. See Compliance Manual section 10620.

b. When backpay has already been liquidated in a court judgment, collection proceedings. See Compliance Manual section 10593.

c. Initiation of contempt proceedings. See Compliance Manual section 10592.

d. Initiation of injunctive proceedings to protect against the dissipation of assets or the respondent otherwise rendering itself incapable of complying. See Compliance Manual section 10594.2.

e. Initiation of compliance proceedings to establish derivative liability or to pursue payment from third parties. See Compliance Manual sections 10596 and 10621.3.

f. Settlement of backpay based on an installment agreement. See Compliance Manual sections 10564.12 and 10603.

g. Administrative closing of the case, based on on the conclusion that the respondent is defunct and totally incapable of paying any liabilities. See Compliance Manual section 10605.

10600.2 Monitoring Respondent's Ability to Comply: Throughout unfair labor practice proceedings, the Region is responsible for continually monitoring and assessing the respondent's current and prospective ability to comply with the remedy being sought. The Region should be alert to any evidence of actions by the respondent to impair its assets, to cease doing business, to sell or transfer its operations or assets, or to otherwise render itself unable to comply with the remedial provisions of the Board's order.

Such issues may be raised by the charging party or discriminatees, or by the respondent when asserting inability to pay, or may come to the Region's attention through other sources such as news reports. Such issues should be promptly and thoroughly investigated, including contacting the respondent and other persons likely to have relevant evidence.

The investigation may be triggered by actions such as the following:

a. Claim of inability to pay or comply raised by any party.

b. Closure of business or substantial part (e.g., layoff).

c. Sale or potential sale of all or part of business.

d. Potential or actual loss of significant portion of customer base (e.g., completion of a major contract).

e. Apparent loss of assets.

f. Lack of cooperation by the respondent in providing evidence of its ability to comply, or supporting its inability to comply.

g. Bankruptcy.

Such actions by the respondent, which may occur at any stage of the processing of the case, raise policy, legal, and factual issues warranting a determination concerning how best to proceed against the respondent to preserve the availability of backpay and other remedies, and prevent substantial noncompliance at the current or later stage of the case. See

Compliance Manual section 10594, et al., regarding injunctive relief, protective restraining orders, and notice to third parties with potential derivative liability, and recording of judgments.

For example, a protective restraining order under Section 10(e) or (j) may be appropriate, additional investigation to locate assets may be warranted, or security agreements may be necessary, in the face of respondent's lack of cooperation.

The Region may consult with Contempt Litigation Branch at any time concerning methods of investigating assets or the various protective measures available at a particular stage of the case. The Region need not await the issuance of a court judgment before contacting Contempt Litigation Branch, as immediate preventive measures may be required prior to completion of the various steps of litigation.

Note, however, that many normal actions to collect, protect, or seize assets are not appropriate in bankruptcy cases. See Compliance Manual section 10610, et al., regarding bankruptcy. Regions should consult with Special Litigation Branch regarding bankruptcy matters.

On assignment of a case to compliance, the compliance officer should immediately assess the respondent's ability to comply. Thus, when the respondent does not respond to communications regarding compliance or when the respondent's ability to comply is not obvious or cannot be verified, the Region should investigate the matter and should make a determination about the respondent's continued ability to comply. See Compliance Manual section 10590.2. Such investigations and determinations should not await the issuance of a court judgment. The charging party and discriminatees should be advised to notify the compliance officer immediately of any significant change in the respondent's financial condition, operations, or identity.

10601 Investigative Methods: The compliance officer should review relevant records, including the ones described below, in order to investigate an assertion of inability to pay. Such records should be sought from respondent or from other sources identified below.

a. Recent financial statements prepared by an outside certified public account or bookkeeping firm.

b. Internal financial reports, ledgers, and other records of income and expenses.

c. Tax returns from recent years.

d. Bank records, including statements, canceled checks, and records of deposits.

e. Public filings, such as articles of incorporation and business licenses.

f. Records of property holdings and other assets, such as vehicles.

g. Documentation of liens, adverse judgments, and other liabilities.

Financial statement of corporate debtor: In addition to providing records and documentations, respondent's representatives should provide full statements and explanations of the respondent's financial condition.

Appendix 6, Financial Statement of Corporate Debtor, provides a guide for developing information regarding financial status. Specific questions and lines of inquiry it contains may not be appropriate in all cases, and in others they may provide only the basis for further investigation.

10601.1 Investigative Resources: Even when the respondent is fully cooperative in the investigation, corroboration from outside sources of its records and statements is generally appropriate. In cases when the respondent is not cooperative, or when its assertions appear questionable, outside sources of information may be critical to the investigation. Among such sources to consider are the following:

a. Employees can provide information about current levels of work, current orders being shipped, customers, and other material issues.

b. Unions can provide information, gained from representational activities, concerning industry conditions.

c. Customers, suppliers, landlords, tenants, utilities, and common carriers may provide information about levels of business activity and performance.

d. Other creditors, including parties to lawsuits, may provide information concerning other respondent liabilities.

10601.2 Investigative Subpoenas: Regions are encouraged to issue, or, as applicable, to request authorization to issue, investigative subpoenas during compliance investigations.

Regions are authorized to issue subpoenas, both duces tecum and ad testificandum, to investigate allegations of noncompliance with a court-enforced Board order. Compliance Manual section 10590.2 provides a more comprehensive treatment of this subject, including examples of general legal precedent supporting the subpoena authority of an administrative agency.

Where allegations of noncompliance concern conduct not clearly within the scope of a court-enforced order, Regions must obtain clearance from the Division of Operations-Management for issuance of investigative subpoenas. This clearance should be sought by memorandum describing, inter alia, the status of the investigation, the information sought, the need for such information, and the efforts made to obtain it. A copy of this memorandum should be sent to Contempt Litigation Branch.

10601.3 Bank Records and Investigative Subpoenas: Bank records of the respondent or other relevant entities may provide a fruitful source of information during a compliance investigation. Regions should consider the use of investigative subpoenas to obtain such records, keeping in mind that under the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3401, et seq.), the Government is foreclosed from issuing subpoenas to banks or other financial institutions in certain situations, unless preissuance notification procedures are followed, or unless certain exceptions apply.

See Compliance Manual sections 10590.2 and 10593.6 for more information about the Act. In addition, the reader should note that the Act contains provisions permitting delayed notification if certain conditions are met. Contact the Contempt Litigation Branch for more information about this or other aspects of the Right to Financial Privacy Act.

Regions should consult with Contempt Litigation Branch before issuing subpoenas, in postjudgment situations, for bank records of entities covered by the Right to Financial Privacy Act.

In situations when no judgment has issued, Regions must obtain clearance from the Division of Operations-Management before issuing subpoenas for

bank records, regardless of whether the entity whose records are sought is covered by the Right to Financial Privacy Act.

When the Right to Financial Privacy Act applies, Regions must serve the entity whose records are sought with both a copy of the subpoena and with a notice advising the entity of its right to object to the production of records and the procedures for making such objections. See Appendix 7 for samples to be used for this purpose.

The Region must wait 10 days after actual service, or 14 days after service by mail, and is then entitled to production of the subpoenaed records, unless the entity has, in the interim, filed a motion to quash in Federal district court. See Appendix 8 for a certificate of compliance form to be sent to the financial institution after the required waiting period, assuming that no motion to quash has been filed.

In the event that an entity files a motion to quash, Regions can anticipate that the district court will order that a sworn response be filed (see 12 U.S.C. § 3410(b)). Regions should consult, as warranted, with Contempt or Operations-Management for advice with respect to this response.

10601.4 Public Sources of Information: Public sources of financial information include Federal agencies, such as the Securities and Exchange Commission, for corporate data in publicly held corporations; the Interstate Commerce Commission, for licensing and background information on financing and ownership for commercial interstate carriers; the Small Business Administration, for officers, stockholders, and purpose of the SBA assistance; the Internal Revenue Service, for records of seizure and sale of real estate, and information regarding tax-exempt organizations; the Postal Service, for new or redirected addresses, location of address, or name and address of business post office box holder; and the Department of Labor, for disclosure of reports concerning labor organizations.

Information available depends on the respective agency's disclosure policy and requests may be directed to the disclosure officer of the respective agency.

The National Directory of State Agencies, N. Wright & G. Allen, a standard reference available in most public libraries, provides names, addresses, and telephone numbers of state regulatory bodies, by function, for all 50 States. Useful state agencies include the department of motor vehicles for ownership and liens registered in the State; the secretary of state for records of

corporations doing business or incorporated in the state, as well as uniform commercial code records disclosing transactions involving collateral; and licensing agencies for businesses such as nursing homes or entities engaged in sales of alcoholic beverages.

Local city or county governments maintain records for tax assessments such as for real estate and personal property, and records concerning business licenses and building permits that may reveal the identity of owners or contractors. Public utilities provide the name and billing address of individuals or the company occupying the premises and may retain copies of payment checks which show respondent's bank and account number.

10601.5 Commercial Sources of Financial Information Available Through the Agency: Dun and Bradstreet reports provide a range of information on ownership and activity of businesses, including names, addresses, and backgrounds of owners, recent levels of business activity, recent payment history, and outstanding liens and judgments. Regions should feel free to consult with Contempt Litigation Branch regarding the range of available information or to discuss a particular situation.

The Agency has subscribed to Dun and Bradstreet, and Regions may request reports on individuals or firms by submitting requests to the Agency's Library Section. The request should contain all known names and addresses of the entities on which information is requested. Because of cost, Regions should not request information from Dun and Bradstreet directly. If there is need for expedited information, the Region may fax or telephone the Library Section.

Contempt Litigation Branch has contracted with Lexis/Nexis, a large database service that can provide information regarding ownership of real estate by individuals and corporations; liens on real and personal property held by individuals and corporations; civil and criminal lawsuits and judgments against individuals and corporations; and other information on corporations.

The real property database details the assessed value of the land and its improvements, the nature, size, and construction date of the improvements, and the sale history of the property. The lien database details the lien's filing date and amount and the holder of the lien. The corporation database details such information as the date and State of incorporation, the corporation's subsidiaries and affiliates, the corporation's officers, any other corporations in which those officers hold a position, and the corporation's

history. Lexis/Nexis also operates a document retrieval service which will provide printed information such as articles of incorporation, certificates of good standing and dissolution, and lien documents.

If Regions have a compliance case in which the type of information provided by Lexis/Nexis might be helpful, they are encouraged to contact the Contempt Litigation Branch for its assistance in determining whether to request a Lexis/Nexis search.

10601.6 General References: The following publications provide general estimates of company assets: *Dun & Bradstreet Reference Book* (financial strength); *Thomas Register of American Manufacturers* (tangible minimum assets of manufacturers); *Standard & Poor's Corporate Records* (total tangible assets); *Moody's Industrials* (describes form of assets for companies listed on a stock exchange); and *Value Line* (specific information).

10601.7 Search or Tracing Services: Search or tracing services are available on a contract basis to undertake specific search or research efforts. Should the Region conclude that such an undertaking is warranted, it must submit a request to the Division of Operations-Management.

10601.8 Accounting Assistance: In some situations, such as when the amount of backpay is large, or the respondent's finances are complex, the Region may conclude that it is appropriate to have the respondent's financial records, contentions, and proposals regarding backpay reviewed by an outside certified public account. If the Region believes that this review is warranted, an appropriate request should be made to the Division of Operations-Management. If the request is approved, Operations-Management will assist the Region to ensure that applicable procurement regulations are observed in contracting for this service.

10603 Installment Agreements and Security Agreements: Installment payment of backpay liabilities may be permitted when the respondent has demonstrated to the satisfaction of the Regional Director that its financial position would be seriously jeopardized by full immediate payment of the obligation.

As a condition to accepting installment payments, the Region should normally insist on security provisions as are commonly required by creditors in ordinary business transactions as protection against default, insolvency, and bankruptcy. When the respondent is a closed corporation, it may be

advisable to require the principal shareholder to guarantee payment, as is commonly required in commercial transactions.

The Region should be particularly alert to situations in which there is doubt as to the respondent's ability or willingness to make the agreed-on payments, and should err on the side of obtaining security agreements in such cases.

Note that if the Region has reason to believe that assets have been, or are being, siphoned off, that all income is not being reported, or that the respondent is acting to evade liabilities, contempt proceedings or other proceedings to protect the Board's interest in securing backpay may be warranted. Regions should consult with the Contempt Litigation Branch in these situations.

In obtaining security provisions for installment agreements, examples of security include a mortgage on real or personal property, a confessed judgment for the full amount, or a guaranty by some third party such as a principal shareholder.

A guaranty agreement should contain a cognovit (confession of judgment) provision that enables the Board to immediately obtain a judgment against the guarantor in the event of default.

Before accepting a lien or mortgage on real or personal property, the Region should satisfy itself that there is an unencumbered, lienable interest available. A title search and appraisal almost certainly will be required, for which the respondent should be expected to bear the expense.

The security agreement should, of course, be perfected as provided by state law. It is imperative, therefore, that each Region become fully conversant with the practice and procedure for the perfecting of such liens in each State in which the Region has jurisdiction. Regions should consult with the Contempt Litigation Branch.

Any lien obtained must be perfected in full compliance with state law as soon as possible, keeping in mind the potential for future avoidance by a trustee or debtor in possession of a lien perfected within the 90 days immediately preceding the filing of a bankruptcy petition. Section 11 U.S.C. § 547.

When there are no assets, or there are insufficient assets, on which to base a security agreement, or when such an agreement is otherwise unobtainable, an alternative is a settlement stipulation containing a consent court judgment under which liabilities are fully liquidated and installment terms are fully specified.

When the amount agreed to be paid is less than the full amount computed due by the Region, the stipulation should state, and the respondent should agree to pay, the full amount computed, but with a proviso that, on payment of all the installments as scheduled except the last, the last installment, for the balance of full backpay, is waived. Settlements providing for installment payments should provide for the payment of interest during the installment payment period.

Sample settlement stipulation and security agreement: A sample settlement stipulation, which contains provisions for security and an accompanying security agreement, is set forth in Appendices 9 and 10, respectively.

In cases where the respondent has no unencumbered assets to secure, the security agreement may be omitted and all references to the security agreement may be deleted from the settlement stipulation.

The executed settlement stipulation and security agreement are to be forwarded to the Division of Operations-Management with a cover memorandum recommending that the stipulation be forwarded to the Board for approval. In its memorandum, the Region should describe the status of the respondent's compliance with all aspects of the Board order or court judgment and explain the pertinent details of the settlement, including whether the backpay amount represents the full amount of net backpay that was claimed or would be claimed in a compliance specification, and, if the amount is less than 100 percent, why the full amount was not obtained.

10604 Other Stipulations: In some situations, such as when the amount owed is relatively small, the payment plan is of short duration, and the respondent appears likely to comply, or when the respondent refuses to enter into a formal stipulation, but will agree to an informal installment plan, the Region may conclude that a formal stipulation providing for a supplemental court judgment concerning the payment of backpay is not warranted. In such cases, other forms of agreement may be appropriate.

10605 Closing a Case on Noncompliance: When the investigation has established that the respondent is without any means of making any payment of backpay or other monetary liabilities, the Region may request authorization from the Division of Operations-Management to close the case without further proceedings.

The request should be through a memorandum that sets forth fully the basis for the Region's recommendation. Appropriate to the circumstances of each case, the memorandum should address such issues as the background of the underlying unfair labor practice; the amount owed; the current status of the respondent's operations and the likelihood of their future resumption; the disposition of the respondent's assets; a description of liens and judgments against the respondent; whether the corporate charter or business licenses have been revoked; whether there are related entities, such as parent or subsidiary corporations, which may be held liable for backpay; whether there is evidence to establish derivative liability through determination of alter ego, successorship, or individual liability of corporate officers or owners; and an assessment as to whether those for whom there may be derivative liability have the financial means to make payment of the monetary remedy.

The charging party's position regarding further compliance efforts should be solicited prior to submitting a recommendation to close. As appropriate, further investigation should be conducted in the face of any leads identified by the charging party. The charging party's position should be reflected in the Region's memorandum recommending closure.

The case, once closed pursuant to Division of Operations-Management authorization, is subject to reopening should subsequent events reveal that compliance could then be achieved.

If it is deemed appropriate to have a judgment lien before closing the case, see Compliance Manual section 10593.4 for more information.

10610 Respondent in Bankruptcy

10610.1 General Principles

a. When a respondent in a pending unfair labor practice case seeks protection under the Bankruptcy Code (11 U.S.C. § 101, et seq.), it is the Region's responsibility to draft and file a timely proof of claim with the bankruptcy court to protect the Board's ability to

collect a backpay remedy at such time as the Board has liquidated the amount.

The general legal principles and basic rules governing the filing of claims are summarized below in sections 10610.3 and 10610.4.

b. The Board is a ''creditor'' of a respondent debtor with respect to unpaid backpay awards under the Bankruptcy Code, as amended in 1984.[149] The courts have found that the Board is the only entity chosen by Congress to enforce the NLRA, and that the NLRA creates no private rights of action.[150]

The Board is thus the only possible creditor for its backpay claims. Under the Code, the Board also remains the sole authority to liquidate its backpay awards.[151]

c. Board unfair labor practice proceedings are administrative regulatory proceedings exempt from the automatic stay pursuant to 11 U.S.C. § 362(b)(4).[152] This is true regardless of whether the respondent is in bankruptcy under Chapter 11 or Chapter 7 of the Code.[153] Moreover, bankruptcy courts do not have jurisdiction under 28 U.S.C. § 1334 or 11 U.S.C. § 105 to impose a discretionary injunction on the Board.[154] In any event, the courts have found that neither the cost of litigation before the Board, nor the potential for a backpay claim against the estate constitutes a ''threat to the assets of the estate'' so as to warrant a discretionary injunction.[155]

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[149] *Tucson Yellow Cab v. NLRB*, 27 B.R. 621, 623 (Bankr. 9th Cir. 1983); *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); and *NLRB v. Killoren*, 122 F.2d 609, 613 (8th Cir. 1941).

[150] *Amalgamated Workers v. Edison Co*., 309 U.S. 261, 265 (1940); *Nathanson*, supra; *In re Matter of Nicholas, Inc*., 55 B.R. 212, 215 (Bankr. D. N.J. 1985); *In re Adams Delivery Service*, 24 B.R. 589, 592 (Bankr. 9th Cir. 1982); *In re Brada Miller Freight Systems*, 16 B.R. 1002, 1008 (N.D. Ala. 1981); *NLRB v. P.I.E. Nationwide, Inc*., 923 F.2d 506, 512 (7th Cir. 1991); and *NLRB v. Continental Hagen Corp*., 932 F.2d 828, 832 (9th Cir. 1991).

[151] *Nathanson*, supra; *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980); and *Tucson Yellow Cab*, supra at 623.

[152] *NLRB v. P.I.E. Nationwide, Inc*., supra at 512; and *NLRB v. Continental Hagen Corp., supra at 832–833, 834, collecting cases.*

[153] See previous footnote; see also *NLRB v. Twin Cities Electric*, 907 F.2d 108, 109 (9th Cir. 1990).

[154] *In re S.T.R. Corp*., 66 B.R. 49, 51–52 (Bankr. N.D. Ohio 1986); *Board of Governors v. MCorp Financial, Inc*., 112 S.Ct. 459, 464–465 (1991).

[155] *Tucson Yellow Cab v. NLRB*, supra, 27 B.R. at 623; *In re Nicholas, Inc*., 55 B.R. 212, 217 (Bankr. D.N.J. 1985); *In re Rath Packing Co*., 38 B.R. 552, 562–563 fn. 6 (Bankr. N.D.Iowa 1984); *In re Brada Miller Freight Systems*, supra, 16 B.R. at 1007, 1012; and *EEOC v. Rath Packing Co*., 787 F.2d 318, 325–327 (8th Cir. 1986).

10610.2 Regional Office Procedures

a. Unless expressly enjoined by a bankruptcy court, the Region should proceed expeditiously with the unfair labor practice or representation case notwithstanding contentions that Board proceedings are automatically stayed under section 362 of the Code, or may be stayed as a discretionary matter under section 105 of the Code.

b. The Special Litigation Branch in Headquarters is responsible for the Board's adversary bankruptcy litigation. The Region should notify Special Litigation immediately concerning any effort to have Board proceedings enjoined. As soon as possible, all relevant pleadings and records from the bankruptcy and unfair labor practice proceedings should be forwarded to Special Litigation.

c. Where an unfair labor practice charge is filed against a party undergoing liquidation, or there is an unfair labor practice case pending against a respondent which then commences liquidation proceedings in bankruptcy, the Region should evaluate the case to determine whether it will effectuate the Act to proceed. Although the decision must be made on a case-by-case basis, the following should be considered: (1) whether there is any real possibility that the debtor will resume operations or that a successor will take over the business and (2) if not, whether the schedules of the debtor's assets and liabilities indicate that the Board could recover more than a token amount on behalf of individual discriminatees. The Region should notify the Division of Operations-Management of those cases when, in the Region's view, it would not effectuate the Act to proceed.

d. The Region should file in the bankruptcy court and serve on the debtor (and trustee where one has been appointed) a Request for Notice of All Proceedings under Rule 2002 and, in Chapter 11 cases, a Request for a Disclosure Statement and Plan of Reorganization under Rule 3017(a). The first notice is filed in *all* cases; the second notice only in Chapter 11 cases.

   See Appendix 11 for a sample Request for Notice and Appendix 12 for a sample Request for Disclosure Statement and Plan of Reorganization.

e. Generally, proofs of claim should be filed as soon as possible after the Region has determined that the charge is meritorious and has

issued complaint. However, when the time for filing the claim may expire before the determination of the merits of the charge, a proof of claim should be filed within the time allowed under the appropriate limitations provision set forth below at section 10610.3, attaching a copy of the charge. Where interim earnings are unknown or calculation would cause undue delay, the claim may be filed without interim earnings and amended at a later date.

The principles and rules set forth below at sections 10610.3 and 10610.4 should be followed in preparing the Board's claim.

f. The Region should notify Special Litigation immediately on notice of an objection to the Board's proof of claim. Copies of the claim, the objection, and all relevant papers supporting the claim should be forwarded to Special Litigation as soon as possible for preparation of a response.

g. The Region should also file in bankruptcy court a notice of the pendency of the unfair labor practice proceeding, together with a copy of the complaint and, if issued, the administrative law judge's decision, Board order, and court of appeals' judgment. The certificates of service should reflect that the notice has been sent to the trustee and all potential purchasers of the business of which the Region is aware. The trustee should be served with copies of all formal documents in the unfair labor practice action.

h. The unfair labor practice or supplemental proceeding should be set for the earliest possible date and the chief administrative law judge advised of the pending bankruptcy proceedings.

i. Backpay specifications should be drafted with sufficient detail to enable the administrative law judge and the Board to particularize the award in a manner that allows for the claiming of the various priorities set forth below in section 10610.3.

j. When the dismissal of a charge involving a respondent in bankruptcy is appealed, the Region should telephonically request the Director of the Office of Appeals to expedite the appeal process. If it is impossible for the appeal to be decided within the period allowed for the filing of proofs of claims, the Region should file a protective proof of claim, noting in the claim that it will be withdrawn if the ULP charge is finally dismissed.

k. Special Litigation should be notified immediately of any proposal to sell the debtor's assets ''free and clear'' of encumbrances.[156]

l. Cases involving discharge in bankruptcy—Special consideration should be given to those cases where a complaint will issue or has issued against an individual or corporation that has been granted a discharge by the bankruptcy court, or against a corporation or partnership that is owned or operated by an individual or corporation that has been discharged in bankruptcy. In such cases, the Region should consider the following factors:

(1) Debts of individuals (11 U.S.C. § 727(a)(1)) and debts of reorganized entities after confirmation of a plan (11 U.S.C. § 1141(c)) are dischargeable. The Bankruptcy Code voids any judgment and enjoins the enforcement of any judgment on a debt which has been discharged. 11 U.S.C. § 524(a)(1) and (2).

(2) Thus, the Board can not seek to hold individuals who have received a discharge liable for prepetition monetary obligations arising out of unfair labor practices. The pursuit of such a prepetition monetary obligation through the issuance of a complaint, compliance, or any other proceedings after the discharge in bankruptcy may result in the Board being enjoined or held in contempt of court.

(3) Because corporations and partnerships are not discharged through liquidations conducted in Chapter 11 or Chapter 7, there is no prohibition in the Code against issuing or prosecuting a complaint which seeks to hold these entities liable for prepetition obligations.

m. Clearance required. Cases when the Region is considering issuing complaint against a discharged individual or entity should be submitted to the Division of Advice.

When complaint has already issued, and the Region determines that the respondent has been discharged in bankruptcy, the case should be submitted to Special Litigation.

In cases when a corporation or partnership has been liquidated and the Region intends to commence or continue prosecution of an unfair labor practice case, the Region should notify the Division of Operations-Management.

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[156] See *International Technical Products Corp.*, 249 NLRB 1301 (1980).

Copies of all submissions should be sent to the Division of Operations-Management.

10610.3 Filing Proofs of Claims, General Principles

a. The most important principle is that all claims must be timely filed.

In Chapter 7 (liquidation) or Chapter 13 (individual debt adjustment) cases, claims must be filed within 90 days after the date set for the first creditors' meeting. Federal Rules of Bankruptcy Procedure, Rule 3002(c). In some cases, the court will send a notice pursuant to Rule 2002(e) that the Board does not have to file a proof of claim because there are no apparent assets in the estate. If the Region subsequently receives a notice from the Bankruptcy Court that the case has become an asset case, the Region must file a claim within 90 days after the clerk *has mailed* the notice that the case has become an asset case. Rule 3002(c)(5).

In Chapter 11 cases, the Board must file a proof of claim if its claim is (1) not listed in the debtor's petition or (2) if it is scheduled, but is inaccurate or listed as disputed, contingent, or unliquidated. Rules 3003(b)(1) and (c)(2). The time for filing the proof of claim is set by the Bankruptcy Court which may be extended when cause is shown. Rule 3003(c)(3).

In cases converted to Chapter 7, those proofs of claim actually filed by the Board in the superseded Chapter 11 case are also considered filed for the Chapter 7 case. Rule 1019(3). The Board must file a proof of claim in the converted Chapter 7, if no claim was filed in the superseded Chapter 11, even where the Board's claim was correctly listed in the Chapter 11 schedule. To the extent a new claim must be filed, the 90-day time period described above for Chapter 7 cases begins anew on conversion. Rule 1019(2). On conversion to Chapter 7, creditors listed by the debtor on the new schedule of unpaid debts (required to be filed within 15 days of conversion) are to be given notice of the conversion and the opportunity to file claims. Rule 1019(6). The Bankruptcy Court is required to fix the time for filing postconversion debts arising from a collective-bargaining agreement. Rule 1019(6).

In the rare reconverted case (i.e., started as Chapter 7, converted to a different chapter, and then converted back to Chapter 7), no new time period for filing claims will be provided if the 90-day period expired during the original Chapter 7 proceeding. Rule 1019(2).

b. Proofs of claim must conform to the requirements of Bankruptcy Rule 3001 and, if based on a Board Decision and Order, Board supplemental decision, and/or court of appeals judgment, the decision must be attached. Rule 3001(c). If no Board order or court judgment has issued, the Region should attach copies of the most recent formal documents, such as a complaint or administrative law judge's decision.

c. Once a proof of claim is filed, the Board's claim is deemed allowed unless an objection to the claim is filed by any party in interest. 11 U.S.C. § 502(a). The objection must be mailed to the Board 30 days prior to the hearing on the objection. Rule 3007. The Region should check the local bankruptcy rules for when the Board's response to the objection must be filed in Bankruptcy Court. The Region should submit any objection to the Board's claim immediately to Special Litigation for preparation of the Board's response.

d. Priorities of claims—There are four potential categories of claims for backpay and other NLRA monetary remedies allowed under the Bankruptcy Code:

(1) First (administrative) priority—backpay which accrues subsequent to the filing of the bankruptcy petition is claimed as an administrative expense under 11 U.S.C. § 503(b)(1)(A), and entitled to a first priority under 11 U.S.C. § 507(1)(1).[157]

In Chapter 11 reorganizations, noncontingent administrative expenses must be paid in full, in cash, on the date of the confirmation of the plan unless the holder of the claim has agreed to defer payment. 11 U.S.C. § 1129(a)(9).

(2) Second priority—In involuntary bankruptcy cases, backpay accruing between the filing of the petition and the earlier of two events—the appointment of a trustee or the issuance of an order of relief—deserves second priority. 11 U.S.C. § 507(a)(2).

(3) Third priority—Backpay representing wages (excluding employee benefit plans) which accrued within 90 days prior to the

[157] *In re Bel Air Chateau Hospital*, 106 LRRM 2834, 2835 (C.D. Cal. 1980) (postpetition ULP); *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983) (same); and *In re Brinke*, 135 LRRM 2769 (Bankr. D. N.J. 1989), affd. 135 LRRM 2800 (D.N.J. 1989) (prepetition ULP, postpetition accruing backpay).

Contra: *In re Wheeling Pittsburgh*, 113 B.R. 187, 141 LRRM 2269 (Bankr. W.D.Pa. 1990) (no administrative priority where ULP occurred prepetition), vacated as moot 141 LRRM 2274 (May 13, 1992); *In re Palau*, 140 LRRM 2437 (BAP 9th Cir. 1992) (same), appeal pending (9th Cir. No. 92-55720); and *In re Continental Airlines*, 141 LRRM 2934 (D. Del. 1992) (same), appeal pending (3d Cir. No. 92-7665).

filing of the bankruptcy petition (or the date that the debtor ceased operations, whichever occurred first) is entitled to a third priority up to a maximum of $2000 per employee. 11 U.S.C. § 507(a)(3).

(4) Fourth priority—Backpay representing contributions to employee benefit plans which accrued within 180 days prior to the filing of the bankruptcy petition (or the date that the debtor ceased operation, whichever occurred first), is entitled to a fourth priority to the extent that when added to the third priority amount does not exceed $2000 per employee. 11 U.S.C. § 507(a)(4).

(5) General unsecured claims—Backpay representing wages accrued more than 90 days prepetition, backpay representing contributions to employee benefit plans more than 180 days prepetition, plus any amounts in excess of the $2000 limit (for 90-day wage and 180-day benefit priorities) are general unsecured claims.

e. Determination of the backpay period—The start and end date of the backpay period is generally controlled by the NLRA. The filing of the bankruptcy petition, by itself, does *not* toll the backpay period. However, as noted above, bankruptcy law controls the priority of the Board's claim for distribution, and it controls the distribution of interest.

f. Calculation of Interest—In both Chapter 7 and 11 cases, prepetition interest on a backpay award is allowed. However, as a practical matter, the amount of interest for which priority can be claimed will be little or none. It may also be time consuming to calculate the amount eligible for priority. Here are the rules:

(a) Interest which accrues prepetition and is calculated based on general unsecured backpay can be claimed only as general unsecured debt.

(b) Interest which accrues postpetition, regardless of the priority claimed for the principal backpay amount, can only be claimed as a separate amount with no priority for distribution pursuant to 11 U.S.C. § 726(a)(5) of the Code. Under this Code section, interest accruing postpetition is distributed only if there are estate assets remaining after all other claims (including general unsecured) are paid, and there is money remaining which would be distributed back to the debtor or the owners of the estate. This rule for postpetition interest has

been applied in cases of reorganization and liquidation under Chapter 11 and Chapter 7.[158]

(c) Interest which: (i) accrues during periods corresponding to the wage and fringe benefit priority periods, (ii) is based on backpay accrued during the same periods, and (iii) when added to the principal claimed amounts under § 507(a)(3) and/or § 507(a)(4) does not exceed the $2000 limit, can be claimed as deserving priority under § 507(a)(3) or 507(a)(4), as appropriate.[159]

10610.4 Rules for Filing Claims

Each proof of claim, at a minimum, should be timely filed and include clear statements covering the subjects discussed below:

a. This proof of claim is filed on behalf of the National Labor Relations Board [rather than on behalf of the discriminatees, charging party, or fringe benefit fund].

b. The National Labor Relations Board is the forum with exclusive authority to adjudicate the liability of the debtor and to determine the appropriate amount of backpay liability. See *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952); *San Diego Building Trades Council v. Garmon*, 359 U.S. 234, 245 (1959); *In re Tucson Yellow Cab Co*., 27 B.R. 621, 622–623 (Bankr. 9th Cir. 1983); and *In re Shippers Interstate Service*, 618 F.2d 9, 12 (7th Cir. 1980).

c. The claim is based on unfair labor practice actions allegedly committed by the debtor, with the accrual of backpay liability continuing from (date) to (date). Violations should be briefly described, noting the relevant dates and the names of affected employees. If the backpay continues to accrue at the time the proof of claim is filed, the claim should so state and the date the claim is prepared can be used as a temporary end date. An amended proof of claim must be filed to update the Board's claim.

d. The status of the unfair labor practice proceeding should be provided, along with copies of the unfair labor practice complaint and/or decisions issued by the administrative law judge, Board, and circuit court.

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[158] *In re Adcom, Inc*., 89 B.R. 2 (D. Mass. 1988); *In re Riverside-Linden*, 945 F.2d 320, 323–324 (9th Cir. 1991); and *In re San Joaquin Estates*, 64 B.R. 534 (Bankr. 9th Cir. 1986).

[159] Senate Report 95-989, July 14, 1978, explains that under 11 U.S.C. § 726(a)(5), ''interest accrued on all claims . . . which accrued before the date of the filing of the title 11 petition is to be paid in the same order of distribution of the estate's assets as the principal amount of the related claims.''

e. Administrative priority, permitted under 11 U.S.C. §§ 507(a)(1) and 503(b)(1)(A) is claimed in the amount of $ ____, for backpay, if any, continuing to accrue to [employees' names] during the period from (date petition in bankruptcy is filed) to (date the backpay stopped accruing) as a result of the losses suffered as a result of the alleged unfair labor practice conduct.

f. Wage priority, permitted under 11 U.S.C. § 507(a)(3) is claimed for the amount of $ ____ for backpay, if any, accruing for [employees' names] during the 90-day period immediately preceding the filing of the bankruptcy petition (or the date the debtor ceased operation, whichever is earlier). (As noted above, a wage priority claim under 11 U.S.C. § 507(a)(3), when added to claims for priority under 11 U.S.C. § 507(a)(4), can not exceed $2000 per employee.)

g. Priority permitted under 11 U.S.C. § 507(a)(4) is claimed for the amount of $ ____ for unpaid contributions to employee benefit plans, if any, accruing during the 180-day period immediately preceding the filing of the bankruptcy petition, or the date the debtor ceased operation, whichever is earlier. (As noted, this priority amount, together with priority claims under 11 U.S.C. § 507(a)(3), can not exceed $2000 per employee.) When more than one benefit plan is involved, and the total benefit plans' claims exceed the $2000 limit (including the 90-day wage priority), distribution of the priority will have to be made to the competing plans so as not to exceed the limit. At the time the proof of claim is filed, it may not be possible to determine the share each plan is to receive under the fourth priority. In that event, the demand for priority should state ''to the extent allowable under 11 U.S.C. § 507(a)(4).'' When determined, the proof of claim should be amended to reflect the share each fund is entitled under the fourth priority.

h. The amount of the Board's total general unsecured claim is the sum of: backpay representing wages accruing for [employees' names] during the period more than 90 days prepetition; backpay representing unpaid fringe benefit contributions accruing for [employees' names] more than 180 days prepetition; plus any amounts in excess of the $2000 limit from the 90-day wage and 180-day benefit priority periods.

i. Interest should be claimed, making sure the calculations are consistent with the rules stated above in section 10610.3(f).

j. It should also be expressly noted whether the Region's figures represent gross backpay or net backpay. In either case, it would be helpful to make clear that ultimately the Board's claim may be reduced by interim earnings or other mitigating factors normally considered by the Board. This would be an appropriate place to state the Board's exclusive authority to make such determinations.

k. Once the calculations are performed for the above summary style statements of claim, there should be little additional labor required to further provide a breakdown, in an appendix, of the figures for each employee. This should be organized by each applicable priority, and their controlling time periods (180 and 90 days prepetition, etc.). Keep in mind that the normal quarterly basis for liquidating backpay amounts under the NLRA will almost invariably cross over the priority boundary dates, and not be helpful to the bankruptcy lawyers and judges who will be reading them. The breakdown, like the summary statements in the claim, should reflect the Board's understanding that any claim for wage and/or fringe benefit priority will not exceed the statutory cap of $2000 per employee.

10610.5 Review of Disclosure Statement and Proposed Plan of Reorganization

a. In a Chapter 11 case, on the receipt of any disclosure statement and proposed plan of reorganization, the Region should immediately review the documents seeking to determine:

(1) The deadlines for objections and the dates for hearing.

(2) Whether the disclosure statement properly describes the Board's claim, including the asserted priority status, and contains adequate information on which the Board can make a reasoned decision on whether to object to the plan.

(3) Whether, under the plan, the Board's claim is impaired under 11 U.S.C. § 1124. Generally, a claim will be impaired if, under the plan, the claim is not to be paid in full.

b. If the Region determines that it is necessary to file an objection to the disclosure statement or plan of reorganization, the Region should immediately submit to Special Litigation the disclosure statement, plan, Board proof of claim, and the Region's recommendation. Special Liti-

gation will prepare and file the objections on the Board's behalf. If the Region can not promptly determine whether to file an objection to the disclosure statement or to a plan, the Region should immediately contact Special Litigation and provide them with a copy of the Board's proof of claim, the disclosure statement and the proposed plan. In either event, the Region should keep in mind the deadline for objections and should inform Special Litigation of the relevant dates.

c. General principles—what follows is a brief overview of the disclosure statements and plans of reorganization in bankruptcy proceedings:

The disclosure statement is intended to be the primary source of information about a plan and the risks to the creditors. Section 1125 of the Code requires disclosure before solicitation of acceptances of a proposed plan of reorganization. The disclosure statement helps the creditor to evaluate the plan and prepare plan objections. In judging the disclosure statement, the sole issue before the Bankruptcy Court is the adequacy of the information given in the statement. See 11 U.S.C. § 1125(b). ''Adequate information'' is defined in Section 1125(a)(1). The disclosure statement should contain historical information on the debtor, a valuation of the debtor's assets, and a projection as to future earnings and financial soundness. The Region should evaluate whether the Board's claim, including the priorities asserted, are accurately represented in the statement and whether sufficient additional information is provided to judge the feasibility of the debtor surviving after confirmation of a plan. The remedy for the debtor's failure to provide adequate information in the disclosure statement is for it to amend the statement. The Board's participation in the amendment process is helpful to ensure that the debtor knows where the Board stands, to help prepare a foundation for an objection to the plan and, hopefully, to commence a dialogue with the debtor which can lead to settlement of the Board's concerns.

The plan defines how the claim of each creditor group will be treated after confirmation. It is accordingly of utmost importance to have the Board's claim properly classified and provided for in the plan. Remember, on issuance of the order of confirmation of the reorganization plan, there is a discharge of all corporate, partnership, and individual debtors' prepetition liabilities except to the extent they are required to be satisfied under the plan.

At a minimum, the plan should be carefully reviewed by the Region with respect to each of the problems listed below:

(a) The Code requires that ''substantially similar'' claims must be placed in the same class. 11 U.S.C. § 1122(a). If the plan places the Board's claim in a class of claims dissimilar to that of the Board, i.e., of lesser priority, an objection to the plan must be made.

(b) The Code also requires that all claims within a class be treated the same. If some class members receive a different payout return, an objection needs to be filed.

(c) The Code, at 11 U.S.C. § 1129(a)(9), also requires that, unless the holder of a claim agrees otherwise, administrative payments be made in cash on the effective date of the plan.

(d) Code § 1129(a)(9) also requires that wage and benefit priority payments be paid in cash on the effective date of the plan, if the *class of holders* of those claims has voted against the plan. The failure to comply with 11 U.S.C. § 1129(a)(9) is a common problem with plans.

(e) The Code at § 1129(a)(11) addresses feasibility. The plan proponent must show that confirmation of the plan is not likely to be followed by liquidation or the need for further reorganization. If the financial statements supplied with the disclosure statement do not demonstrate that the plan is feasible, it is appropriate to object on this ground as well.

It bears repeating: if there is any doubt concerning the disclosure statement or plan, submit the matter immediately to Special Litigation. Otherwise, submit to Special Litigation those disclosure statements and plans which the Region has determined require an objection.

10610.6 First Meeting of Creditors

Where possible, the Region should send a representative to the first meeting of creditors. Section 341(a) of the Code provides that within a reasonable time after the order for relief, the United States Trustee shall convene and preside at a meeting of creditors.

Pursuant to sections 301 and 303, either ''the commencement of a voluntary case'' or entry of the order for involuntary relief constitutes the point after which a meeting may be held. Once an ''order of relief'' exists, the actual timing of the section 341 meeting is governed by Rule 2003(a). That Rule provides that, in all cases except those arising under Chapter 12, the United States Trustee must convene the meeting between 20 and 40 days after the order for relief.

Federal Rules of Bankruptcy Procedure, Rule 2003 provides for matters concerning the time, nature, and type of business to be conducted at the creditors' meeting in cases arising under Chapters 7 and 11. Section 343 of the Code provides that ''the debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title.'' This examination will enable the creditors and trustees to determine whether there has been full disclosure of the assets, whether assets have been disposed of improperly, and whether there are grounds for objection to discharge. An examination of the debtor under sections 341 and 343 has generally been found to be less enlightening than a deposition pursuant to Rule 2004. This is because all of the creditors present at the section 341 meeting are entitled to examine the debtor, with each creditor allowed a limited time for questioning, with no opportunity to follow up. However, attendance at a section 341 meeting may be rewarded by the information acquired from listening to the answers to other creditors' questions.

10610.7 Rule 2004 Discovery

a. The purpose and clear intent of Rule 2004 is to give parties in interest an opportunity to examine individuals having knowledge of the financial affairs of the debtor in order to preserve the rights of creditors.[160] Moreover, the examination parallels ''the nature of a discovery proceeding,'' and the relevancy of questions propounded during an examination is determined by the broad test applied under the Federal Rules of Civil Procedure, rather than the more stringent standards applied at trial by courts when evaluating evidentiary matters.[161] Due to the expansive nature of a Rule 2004 examination, the fact that information obtained during the course of the examination

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[160] *In re GHE Companies*, 41 B.R. 655, 660 (Bankr. D. Mass. 1984), ''The scope of a Rule 2004 examination is 'unfettered and broad''' as well. *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985). ''[A]ny question is permissible which seeks to ascertain facts concerning the Debtor's conduct, property and affairs.'' 2 Collier on Bankruptcy (Matthew Bender), Para. 343.04 (15th Ed. 1990).

[161] *Chereton v. U.S.*, 286 F.2d 409, 413 (6th Cir. 19??), cert. denied 366 U.S. 924 (19??), rehearing denied 366 U.S. 978 (1961).

may be used in litigation in another forum has been held not to constitute a valid objection to an order for such an examination.[162]

The same broad and unfettered scope of examination applies to third parties possessing information relevant to the acts, conduct, or property of the debtor or the administration of the debtor's estate.[163] This large latitude of inquiry is specifically allowed in the examination of persons closely connected with the bankrupt (i.e., the debtor) in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, on any reasonable surmise. Rule 2004(c) indicates that the production of documentary evidence may be obtained from any person, including the debtor, by a subpoena.

b. Rule 2004 requires that the party seeking the examination obtain an order from the court authorizing the examination. Rule 2004(a). The motion should state the person to be examined and the purpose of the examination. Pursuant to Rule 2004(d), the court may ''order the debtor to be examined . . . at any time or place it designates, whether within or without the district wherein the case is pending.'' This necessarily imports that no subpoena need issue to compel examination of the debtor.

If faced with a recalcitrant debtor unwilling to submit to a Rule 2004 examination, Bankruptcy Rule 2005 provides for the apprehension and removal of the debtor to compel attendance. In addition, according to Rule 2004(d), there are no territorial limits of service of an order on the debtor.[164]

When the party to be examined is not the debtor, then the production of both the witness and documents may be compelled by the issuance of a subpoena pursuant to Rules 2004(c) and 9016. Rule 9016 merely provides that Rule 45 of the FRCP applies. With the invocation of Rule 45, however, a myriad of complications can arise, primarily because the bankruptcy judge does not have the authority to compel a person other than the debtor, who is outside the judicial district and more than 100 miles from the place of trial, to attend an examination.[165]

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[162] See *In re Table Talk*, supra at 145; *In re Mittco, Inc*., 44 B.R. 35, 37 (Bankr. E.D. Wis. 1984); and *In re Mantolesky*, 14 B.R. 973, 979 (Bankr. D. Mass. 1981).

[163] *In re Johns-Manville Corp*., 42 B.R. 362, 364 (S.D.N.Y. 1984).

[164] *In re Totem Lodge & Country Club*, 134 F.Supp. 158 (S.D.N.Y.1955).

[165] *In re MMI Assoc*., 423 F.Supp. 41 (W.D.N.C.1976).

Pursuant to 28 U.S.C. § 1821, if the debtor is the one to be examined, the examining party generally must tender mileage fees to the extent that the situs of the examination is more than 100 miles from the debtor's residence. If the party to be examined is not the debtor, the examining party must, in addition to the mileage fee, tender a witness fee. 28 U.S.C. § 1821.

c. Prior to seeking discovery pursuant to Rule 2004, the Region should notify Special Litigation.

10610.8 Special Litigation Branch Clearance

a. In addition to the situations noted above, the Region should also submit to Special Litigation for handling any bankruptcy cases involving contested matters, adversary proceedings, or novel or complex issues.

b. The Region should also seek clearance from Special Litigation before approving a withdrawal request or settlement agreement in those cases where such approval would affect the Board's position in pending bankruptcy proceedings.

c. The Code declares that a bankruptcy court may estimate any unliquidated claim, pursuant to a hearing, if waiting for the final liquidation of the claim would ''unduly delay the administration of the case'' (11 U.S.C. § 502(c)(1)). The law defining the procedure for estimation, the legal consequence of such a proceeding, and its applicability to Board proceedings is unsettled. Accordingly, any motion or petition to estimate the Board's claim should be promptly submitted to Special Litigation.

10610.9 Rejection of Collective-Bargaining Agreements

On July 10, 1984, the Bankruptcy Code was amended, adding 11 U.S.C. § 1113 to supersede the holding of the Supreme Court in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In all bankruptcy cases commenced on or after July 10, 1984, in order to secure Bankruptcy Court approval of the rejection of a collective-bargaining agreement under § 1113, the debtor-in-possession or the trustee must first make a proposal to the union of the mid-contract modifications ''necessary'' to permit reorganization and must provide information necessary to evaluate the proposal. 11 U.S.C. § 1113(b)(1).

In cases controlled by § 1113, the collective-bargaining agreement continues in effect until the Bankruptcy Court approves the application for rejection of the contract. 11 U.S.C. § 1113(f). However, after a hearing, if the court finds that certain contract changes are ''essential to the continuation of the debtor's business or in order to avoid irreparable damage to the estate,'' the court can order such changes prior to a final decision on the application for rejection. 11 U.S.C. § 1113(e). Note, however, that neither *Bildisco* nor 11 U.S.C. § 1113(b) permits the debtor-in-possession or the trustee to refuse to recognize or bargain with the Union, and failure to do so can be found to be a violation of Section 8(a)(5).

In all Chapter 7 cases, contracts not assumed by the trustee within 60 days after the order for relief is entered, or within such additional time as the court may allow for good cause, are then deemed rejected. 11 U.S.C. § 365(d)(1).

10610.10 Enforcement Issues

In any case where the respondent in an unfair labor practice proceeding has filed a bankruptcy petition prior to, or on the issuance of, the Board's order, the Region should initiate supplemental backpay proceedings following issuance of the Board order without awaiting enforcement.

Ordinarily a case should not be referred for enforcement unless there is an objective basis for believing that the business will continue or be resumed. When the Regional Director is of the opinion that a liquidation case should be referred for enforcement, the case should first be submitted to the Division of Operations-Management for approval.

10610.11 Assignment for the Benefit of Creditors

The ''assignment for the benefit of creditors'' is a common law action now covered by statute in over 40 States. Under an assignment of this type, all the debtor's assets are normally transferred to an assignee who is responsible for liquidating the assets and distributing the proceeds on a pro rata basis to the creditors. In essence, what is created is a liquidating trust, with any remaining assets reverting back to the debtor. L. King and M. Cook, *Creditor's Rights, Debtor's Protection and Bankruptcy*, Section 9.02 at 547 (1985); J. Moore and W. Phillips, *Debtors' and Creditors' Rights*, pp. 8-14 to 8-23 (1979). This assignment is distinguishable from a Federal bankruptcy proceedings in that there is no discharge from debts. *Creditors' Rights*, etc. at 551–552, citing *Pavone Textile Corp. v. Bloom*,

90 N.Y.S. 2d 785 (S.Ct. 1949), affd. 302 N.Y. 206, affd. 342 U.S. 912. The degree of regulation of such assignments by state law varies. Typically, the assignment must be recorded, along with a filing of a list of the debtor's assets and liabilities. An assignment for the benefit of creditors does not require approval of the creditors. However, it can be overcome by the filing of an involuntary bankruptcy petition pursuant to section 303(h)(2) of the Bankruptcy Code. 11 U.S.C. § 303(h)(2).[166] Depending on the individuals involved, and the rights afforded the creditors under state law, as compared to Title 11 bankruptcy law, an assignment may or may not be preferable to having the debtor-in-possession.

If an assignment for the benefit of creditors occurs, the Region should promptly review state law to determine how the protection accorded creditors compares with Federal law. The Region should then submit to Special Litigation a recommendation as to how the Board should proceed.

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[166] Under this provision, an involuntary bankruptcy can be initiated where:

> within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

If the creditors fail to file within the 120-day period of the assignment, sec. 303(h)(2) is no longer available and the higher standard of sec. 303(h)(1) must be shown. The 120-day period under sec. 303(h)(2) is triggered when the assignee is appointed or assets are relinquished to the assignee for distribution. *In the Matter of B.D. International Discount Corp*., 15 B.R. 755, 764 (Bankr. S.D.N.Y. 1981), affd. 701 F.2d 1071 (2d Cir. 1983), cert. denied 464 U.S. 830 (1983). However, regardless of the reason for commencing an involuntary bankruptcy, sec. 303(h)(2) does not permit the Board to escape the hurdle that, under the Code, creditors with contingent claims are precluded from initiating an involuntary bankruptcy, and the Board's claim will be considered contingent until the Board issues a final unfair labor practice decision and order.